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Supreme Court, U.S
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

WILLIE RAY COLE, JR., Petitioner,

V.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a certificate of appealability should have been issued because it can be reasonably debated whether *Booker* sets forth a logical continuation of the rights for defendants who were sentenced after *Apprendi*, and therefore should be applied retroactively, as it is not a new procedural rule?

II. Whether a certificate of appealability should have been issued because it can be reasonably debated that the right of confrontation as defined by *Crawford* should be applied retroactively?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the parties to the proceedings below were Petitioner Willie Ray Cole, Jr., and the United States of America. The United States is the Respondent before this Court.

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I. A United States court of appeals has decided an important federal question in a way that conflicts with a relevant decision of this court; namely the determination of whether it is reasonably debatable that the decision in *United States v. Booker* is a logical continuation of the rights granted in *Apprendi*, and that a certificate of appealability should issue for the case to be decided on its merits.

II. A United States court of appeals has decided an important federal question in a way that conflicts with the decision of another United States court of appeals on the same important matter; namely the determination of whether it is reasonably debatable t that decision in *Crawford v. Washington* should apply retroactively, and that a certificate of appealability should issue for the case to be decided on its merits.

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OPINION BELOW

The unpublished opinion of the Court of Appeals for the Fifth Circuit styled *United States v. Willie Ray Cole, Jr.*, No. 05-51573, issued on October 24, 2006, is attached hereto as Appendix A.

JURISDICTION

The United States District Court was granted exclusive original jurisdiction over this case by 18 U.S.C. § 3231.

Appeal was made from the final judgment of the District Court to the Fifth Circuit Court of Appeals under 28 U.S.C. § 1291.

The Court of Appeals affirmed in an order entered October 24, 2006. There was no petition for rehearing. This petition follows within 90 days of the judgment of the Court of Appeals.

The jurisdiction of this Court to grant certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

The United States is a party to be served, and the undersigned states that service has been made on the Solicitor General of the United States, Room 5614, Dept. of Justice, 950 Pennsylvania Ave NW, Washington DC 20530-0001, pursuant to Supreme Court Rules 14.1(e)(v) and 29.4(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or

limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner Cole was indicted on May 7, 2002, on the charges of conspiracy to distribute and possess with intent to distribute a controlled substance, distribution of a controlled substance, aiding and abetting, possession of a firearm by a felon, and carrying a firearm during a drug trafficking crime. Cole pled guilty pursuant to a plea agreement filed on July 1, 2002, to the offenses of possession with intent to distribute cocaine and felon in possession of a firearm. Cole was sentenced to a term of imprisonment of three hundred and sixty months, to be followed by a term of supervised release for five years. At the time, Cole waived his general right to attack his sentence pursuant to § 2255.

Following the decisions in *Crawford* and *Booker*, Cole subsequently filed a § 2255 motion to correct his sentence on August 19, 2005. The District Court denied the § 2255 motion. Cole then filed a Notice of Appeal and Motion for Certificate of Appealability on November 15, 2005. The district court denied the request for certificate of appealability. Cole then appealed this decision to the Fifth

Circuit Court of Appeals, requesting certificate of appealability. On October 24, 2006, the Fifth Circuit Court of Appeals denied Cole's request for a certificate of appealability.

REASONS FOR GRATING THE WRIT

I. A United States court of appeals has decided an important federal question in a way that conflicts with a relevant decision of this court; namely the determination of whether it is reasonably debatable that the decision in *United States v. Booker* is a logical continuation of the rights granted in *Apprendi*, and that a certificate of appealability should issue for the case to be decided on its merits.

The Fifth Amendment provides in part that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. Likewise, the Sixth Amendment provides in part that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. Amend. VI. Recent jurisprudence in this court have provided more clarifications of these constitutional rights.

This court decided in *Apprendi v. United States*, 530 U.S. 466 (2000), that a jury, and not a judge, must provide the assessment of facts that increased the prescribed range of punishment for an offense. The decision in *Apprendi* was further clarified by the decisions in 2004 of *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005).

Essentially, in *Blakely* and *Booker*, the Supreme Court delivered a knockout blow to binding sentencing guidelines. However, there remains the unresolved question of whether the thousands of federal prisoners sentenced before *Blakely* and *Booker* are entitled to any relief. Since most of their convictions are "final" (that is, the deadlines for filing appeals or petitions for certiorari have expired), these prisoners must resort to the federal habeas statute at 28 U.S.C. 2255 to attack their sentences under *Blakely* or *Booker*. This is the exact position that Cole finds himself in,

and that the lower courts have denied a certificate of appealability to determine.

This court has the authority to review a denial of certificate of appealability, as established in *Hohn v. United States*, 524 U.S. 236 (1998). *Hohn* considered a case where this court had, following a direct review of the petitioner's case, altered the definition of the statute under which he was convicted. This court found that this change was a constitutional one, and remanded the case to the lower court to reconsider the case. Importantly, *Hohn* established that this court has the jurisdiction to reconsider a lower court's denial of a certificate of appealability.

To be eligible for a certificate of appealability, a petitioner must demonstrate that the point of appeal is at least reasonably debatable, as indicated in *Slack v. McDaniel*, 529 U.S. 473 (2000). While the Fifth Circuit has decided the issue of the retroactive applicability of *Booker* in *United States v. Gentry*, 432 F.3d 600 (5th Cir. 2005), Cole believes that this case is wrongly decided, and desires an opportunity to argue that point.

In brief, the argument that Cole would present, given the opportunity is as follows. Before the decisions in *Blakely* and *Booker*, the federal guidelines required federal judges to lengthen many sentences for conduct neither found by a jury nor proved beyond a reasonable doubt. Through the collateral vehicle provided by a 2255 motion, federal prisoners could attack these types of sentences on two distinct constitutional theories: (1) the sentence violated the Sixth Amendment because a jury did not find facts legally essential to the punishment; and (2) the sentence violated the Due Process Clause of the Fifth Amendment because those same facts were not proved beyond a reasonable doubt. Collateral challengers may not, however, claim relief under a newly announced Court decision absent a threshold determination by a federal court that the decision applies retroactively to cases on collateral review. As such, the possibility remains that these prisoners will lack a forum in which to remedy any *Blakely-Booker* constitutional

violations. This court has already declared nonretroactive the jury-trial prong of *Apprendi* (and a fortiori *Blakely* and *Booker*) in *Schriro v. Summerlin*, 542 U.S. 348 (2004).

The only potential challenge that remains is the Fifth Amendment due process violation as the only *Blakely-Booker* claim still cognizable in a 2255 motion. In the absence of a Supreme Court ruling to the contrary, lower courts are free to decide whether the *Blakely-Booker* due process requirement applies retroactively, as determined in *Ashley v. United States*, 266 F.3d 671 (7th Cir. 2001). The Fifth Circuit has decided against the retroactive application of *Booker*, as have all other circuits to date. However, as this issue has not been decided by this court as of yet, it remains a reasonably debatable question, and therefore should be granted a certificate of appealability.

II. A United States court of appeals has decided an important federal question in a way that conflicts with the decision of another United States court of appeals on the same important matter; namely the determination of whether it is reasonably debatable that decision in *Crawford v. Washington* should apply retroactively, and that a certificate of appealability should issue for the case to be decided on its merits.

The Sixth Amendment provides, in part, that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36 (2004), this court declared that an accused has the right to cross-examine any testimonial witnesses to be used against him or her, regardless of prior exceptions in the Rules of Evidence. At least one circuit, the Ninth, has declared that the rights in *Crawford* apply retroactively, in *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005).

In Cole's sentencing, the sentence was increased due to testimony regarding an incident of mental illness not

related to the original offense. While the sentencing court found that there was no right to confrontation at sentencing, *Crawford* provides that the only indicium of reliability sufficient to satisfy constitutional demands is confrontation.

As the question of both the retroactivity of *Crawford* and its application at sentencing have not yet been decided by this court, it is a reasonably debatable question that should be decided on its merits, as indicated in *Slack v. McDaniel*, 529 U.S. 473 (2000). While the lower courts declined to approve a certificate of appealability, this court has the jurisdiction to do so, as was decided in *Hohn*. Therefore, a certificate of appealability should be granted to decide this question.

CONCLUSION

For the foregoing reasons, I respectfully urge that the writ of certiorari be granted, and the case considered on its merits.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-51573
USDC No. 1:05-CV-665
USDC No. 1 1:02-CR-118-ALL

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

WILLIE RAY COLE, JR., Defendant-Appellant

October 24, 2006, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Texas

ORDER: Willie Ray Cole, Jr., federal prisoner #28648-180, has applied for a certificate of appealability (COA) for an appeal from the district court's order denying as time-barred his 28 U.S.C. § 2255 motion challenging his 2002 conviction of possession of a controlled substance with intent to distribute and of being a felon in possession of a firearm. Cole contends that his motion is not time-barred because it relies on a new rule of constitutional law announced in *United States v. Booker*, 543 U.S. 220 (2005). Cole has not shown that the district court's determination is reasonably debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). COA is DENIED.

CARL E. STEWART
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Case No. A-05-CA-665-JN
[No. A-02-CR-118-JN]

WILLIE RAY COLE, Movant

vs.

UNITED STATES OF AMERICA, Respondent

November 16, 2005, Filed

ORDER: BE IT REMEMBERED on this the 16th day of November 2005, the Court reviewed the file in the above-styled cause and specifically the "Notice of Appeal" [#44] filed November 15, 2005, whereby the movant is attempting to appeal this Court's order of November 8, 2005, dismissing the movant's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. The Court construes the notice as a request for certificate of appealability. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") § 102, codified at 28 U.S.C. § 2253(c)(2), the Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." Where the court has dismissed a § 2255 petition on a procedural ground without reaching the prisoner's underlying constitutional claims, a certificate of appealability may not issue unless the prisoner shows both (1) "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and (2) that jurists of reason would find it debatable whether the district court's procedural holding was correct. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

The movant failed to identify any particular issues for appeal. Furthermore, for the reasons stated in the Court's

order dated November 8, 2005, dismissing the movant's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255, which are incorporated by reference herein, the Court concludes no issues presented in this case merit the issuance of a certificate of appealability. Accordingly,

IT IS ORDERED that the movant's request for certificate of appealability is DENIED.

SIGNED this the 16th day of November 2005.

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE